# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1583

ALVIN C. MOYER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the district court (Pet. App. 66–69) is not officially reported. The opinion of the court of appeals (Pet. App. 63–64) is reported at 420 F. 2d 375.

### JURISDICTION

The judgment of the court of appeals was entered on January 9, 1970 (Pet. App. 65). By order dated March 25, 1970, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 15, 1970. The petition was filed on May 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the government's suit for collection of assessed taxes, penalties and interest was timely filed.

## STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6502. Collection after assessment.

(a) *Length of Period.*—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

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## STATEMENT

The United States brought this civil action against petitioner to reduce to personal judgment certain taxes, penalties and interest which were assessed for the years 1957 through 1960 (R. 4a–7a, 11a–12a).[1] The parties stipulated (R. 27a) that the taxes were timely assessed in the correct amounts. The first of

[1] "R." references are to the record appendix originally filed in the court of appeals and now on file in this Court.

the twelve assessments was made on November 22, 1957, and the last on June 3, 1960 (R. 27a–28a). On June 21, 1960, petitioner submitted an offer in compromise of these assessments to the Internal Revenue Service (R. 14a, 17a–18a, 28a). That offer included the following provision (R. 17a, 28a):

> 6. The undersigned proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for 1 year thereafter.

On March 20, 1962—one year, eight months, and twenty-seven days after the offer was submitted[2]—the Internal Revenue Service rejected the offer (R. 19a, 28a).

On July 16, 1966, petitioner executed the first of two tax collection waivers of the statute of limitations, the effects of which were to extend the time for collection of the taxes assessed to March 31, 1967, one day after this action was instituted (R. 15a, 20a, 27a). The parties stipulated (R. 15a–16a, 27a) that the sole issue was whether, as of July 16, 1966, this suit was barred by the statute of limitations for

[2] The district court and counsel erred by two days in computing the time during which the offer in compromise was outstanding, arriving at a figure of one year, eight months, and twenty-nine days (R. 28a; Pet. App. 68). This error was not corrected by the court of appeals, but has no effect on the outcome.

collection of tax, which is prescribed in Section 6502(a) of the Internal Revenue Code. It was agreed (R. 15a, 27a) that if the time for collection expired prior to July 16, 1966, the waivers executed by petitioner would not be binding.

The district court held (Pet. App. 66, 69) that the time for collection had not expired as of July 16, 1966, and accordingly granted the government's motion for summary judgment. It reasoned as follows (Pet. App. 67): but for the offer in compromise, the statute of limitations on the earliest assessment would have run, pursuant to Section 6502(a)(1), on November 22, 1963, six years after the date of that assessment; the effect of the offer in compromise, which was executed pursuant to Section 6502(a)(2), was to extend the six-year statutory period for a total of two years, eight months and twenty-seven days, until August 18, 1966; thus, collection of the earliest assessment—and, necessarily, the later assessments as well—was not barred on July 16, 1966, the date on which petitioner executed the first of the two waivers. On appeal, the Third Circuit affirmed, *per curiam* (Pet. App. 63–64).

## ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review by this Court.

I. When petitioner made his offer in compromise, he agreed to "the suspension of the running of the statutory period of limitations" on collection for the period during which the offer was pending, and one year thereafter. The sole issue here is the meaning of the quoted language.

Petitioner contends (Pet. 61) that the language should be interpreted to mean that the assessed tax may be collected at any time during the pendency, or within one year after rejection, of the offer in compromise. Thus, under his theory, the offer served only to permit collection of the tax until March 20, 1963. Since the normal six-year period as to even the final assessment would have expired on June 3, 1966, petitioner argues that collection of all twelve assessments was barred on July 16, 1966, when the first of the waivers was executed.

This argument is without merit. As the district court pointed out (Pet. App. 68–69), the offer in compromise does not say that there should be a "suspension of the expiration of the statutory period of limitations" on collection while the offer is pending and for one year thereafter. It says that there is to be a "suspension of the running of the statutory period." The critical language has uniformly been interpreted to mean that the statute is tolled during the specified period, and not merely that the time for collection is extended if it otherwise would run. See, *e.g.*, *United States* v. *Markowitz*, 34 F. Supp. 827, 829–830 (N.D. Calif.); *United States* v. *Harner*, 101 F. 2d 161 (C.A. 8); *Bank of Commerce & Trust Co.* v. *United States*, 32 F. Supp. 942, 946–947 (W.D. Tenn.), affirmed *per curiam*, 124 F. 2d 187 (C.A. 6); *United States* v. *Shanman*, 216 F. Supp. 408, 410–411 (E.D.S.C.); *United States* v. *Bosk*, 180 F. Supp. 869 873–874 (S.D. Fla.); *United States* v. *Mortell*, 248

F. Supp. 706 (N.D. Ill.). There is no reason for departing from this uniform interpretation here.

2. *United States* v. *Updike*, 281 U.S. 489, and *Hoosac Mills Corp.* v. *Commissioner*, 75 F. 2d 462 (C.A. 1), relied upon by petitioner (Pet. 49–58), are not in point. In neither of these cases involving the tax liability of transferees was the language of the pertinent statutory provisions similar to that of the offer in compromise here in dispute.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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